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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),
Petitioner,

vs.

WILLIAM W. SCARLETT,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondent respectfully requests a rehearing herein upon the following grounds:

I.

That the ladder was not DEFECTIVE, as stated in the opinion, is not the test of compliance with, or violation of, the Safety Appliance Act. The Statute uses the word SECURE and *not* the word DEFECTIVE.

This Court, as well as other Federal and State Courts have all held that the word SECURE as used in the Statute means "safe and not exposed to danger".

In *Texas etc. v. Rigsby,* 241 U. S. 35, this Court stated that a *secure* ladder was one that would "enable the employees to safely ascend and descend".

In *Davis v. Raynolds,* 280 Fed. 362 (certiorari denied, 258 U. S. 627), *secure* steps were defined to mean "steps which furnished secure footing for employees having to use them".

In plain language, the object of the statute was to enable respondent, as well as all employees, to ascend and descend ladders in *security* and *safety.* If, in the use of ladders, employees' feet come in contact with an obstruction, then the ladder is *insecure;* that is, *not safe for use.* Whether or not either the ladder or the rod, as stated in the opinion, was *defective* is beside the question. No such issue was before this Court, or any of the lower Courts. By the use of the word DEFECTIVE, this Court by judicial legislation, has narrowed, restricted and circumscribed the beneficial purposes of the Safety Appliance Act. It has narrowed the humane purpose of a statute enacted, not for the benefit of the carrier, but for the benefit of railroad employees. By this decision, we respectfully urge, the Court has transposed the liability and benefit created by the statute; it has transformed the shield of the employee into the sword of the master; it has gone contrary to what now amounts to an almost universal application of this statute and to its own previously expressed humanitarian views with respect thereto.

The conclusion of the Court that the brace rod was not part of the ladder was arrived at because, obviously, the Court was looking for *defects* in the ladder as an appliance rather than *security in use* of the same appliance. If the test of security in use is applied, then clearly anything that renders the ladder *insecure in use,* is part and parcel of the ladder. Whether or not, the ladder was *defective* was entirely immaterial.

The right of recovery, we respectfully urge, does not "rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective". On the contrary the right of recovery, as shown by the long line of decisions in this country broadly and justly interpreting the humane purposes of the Act, depends upon the security or safety of the ladder in use. Suppose spikes, extending outward to brace the side walls of the car, behind the treads and uprights of the ladder, still cleared the treads by the distance prescribed by the Commission, would this Court narrow and restrict the humane purpose of the Act to hold that as long as the spikes were not defective and the rungs of the ladder were not defective, no right of recovery existed under the Act, even though it appeared that in use, the ladder would present the utmost danger to carrier's employees? Whether or not the brace rod was a part of the ladder as such is beside the question. If by the presence of any dangerous contrivance, security of the ladder in use is menaced, or impaired in the slightest degree, the Safety Appliance Act will, and has been held by

many Courts to, provide the protection and safeguard for employees intended by Congress.

The injury of respondent did not result from his use of the brace rod. Respondent was injured while using the ladder. We most respectfully contend that the absolute liability imposed by the Safety Appliance Act was not intended by Congress to be an instrumentality for the making of nice distinctions in limitation of the rights of safety accorded carrier employees in the performance of their duties. Absolute liability, we urge, is not a shield to be erected by the carrier to prevent the accrual of the clearly intended benefits of the Act. On the other hand, where a device appears to be insecure in use, the remedy should be afforded.

II.

Unless the Court intended by its opinion to overrule the case of *Great Western v. Donaldson,* 246 U. S. 121, the statement in the opinion of the existence of a presumption that the Interstate Commerce Commission knowingly permitted its rule with respect to ladder tread clearance, to remain unchanged, in spite of knowledge of the existence of the dangerous brace rod, *is* contrary to the case of *Great Western v. Donaldson,* supra.

This Court expressly held in the *Great Western v. Donaldson* case, that failure of the Interstate Commerce Commission to disapprove certain types of equipment, does not warrant the conclusion that the carrier thereby can escape liability.

Furthermore, the statement in the opinion that the diagonal brace rod was adopted in *1924* and that the proof shows that "for many years cars so equipped have been in general and constant operation on its lines" is not in accord with the record. The brace rods adopted in 1924 were in the *interior* of the cars. (R. 50.) The rods of the type in question admittedly were not put in use until *1929*. (R. 36.) The accident occurred August 27, 1931. (R. 20.) Two years use of the rod can therefore hardly be considered "many years" or "long continued use" as stated in the opinion.

There having been *in fact no* long continued use of this brace rod, there appears to be no legal justification for the conclusion of the Court. It follows therefore that this ladder was *insecure* in a respect not covered by *any* regulation of the Commission. This is the *pith* of the issue and yet, being the important Federal question involved, is *untouched* by the Court.

III.

The record fails to sustain the factual conclusion arrived at in the opinion, to the effect that the presence of the diagonal brace rod was not dangerous to life and limb of carrier's employees, for the reason given by the Court that no accident had been attributable thereto.

True, as stated in the opinion, the general foreman of the company testified that he had never heard of an accident attributable to the brace rod, except that

in the present case. Is it possible that the highest Court of the land bases its conclusion upon a statement of a railroad employee that *he* had never heard of another accident attributable to the brace rod? The opinion proceeds: "the record shows nothing to the contrary". If by this conclusion the Court means that no testimony was offered by respondent to show that in fact the general foreman *had heard* of such accidents, obviously respondent did not, and could not, have produced any such evidence. If the Court means by this conclusion that there was nothing in the record to show that there had been other accidents, with respect to the brace rod; then it must be that the Court has entirely overlooked the testimony of John F. Struby (R. 124), Clarence Craig (R. 125) and Theodore Shafer (R. 126), all employees or former employees of the carrier, who testified as to their feet hitting the brace rod.

We respectfully pray that this petition for a rehearing be granted, and this cause redetermined by this Court.

Dated, San Francisco, California,
April 14, 1937.

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JAMES F. HOEY,
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